A

Hafizah bt Hamzah v Trans Resources Corp Sdn Bhd

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-03-(IM)-34–05 OF 2017
BADARIAH SAHAMID, MARY LIM AND YEOH WEE SIAM JJCA
12 JUNE 2018

C *Civil Procedure — Attachment — Garnishee order — Whether facts of case showed that appellant did not owe a crystallised actionable debt to the judgment debtor at the time application for the garnishee order was made — Whether High Court was wrong in the circumstances to have granted garnishee order absolute against the appellant*

D

The respondent had obtained a monetary judgment against Carmichael Asia Sdn Bhd ('the JD') and commenced judgment debtor summons ('JDS') proceedings against the latter. During the JDS proceedings, the JD's auditor ('Siva') testified that the appellant — then one of the directors in the JD — E owed the JD RM1,416,279 ('the purported debt') as shown in the JD's financial statement for the year ended 31 January 2012. Relying on Siva's evidence, the respondent filed proceedings to garnish the purported debt. The appellant denied owing the JD the purported debt and showed evidence that she had paid for all her shares in the JD. The appellant also tendered a statutory F declaration ('SD') from Siva in which the latter retracted what he had said during the JDS proceedings and explained that based on his getting further information from the company's secretary the appellant did not owe the JD any debt. The High Court judge rejected Siva's SD on the ground it contradicted G his earlier oral testimony. The judge also rejected the appellant's contentions and said the JD's financial statement clearly showed that the purported debt was owed by the directors of the JD. The judge affirmed the garnishee order absolute that was made against the appellant by the senior assistant registrar. The instant appeal was against the High Court judge's decision.

H

Held, unanimously allowing the appeal and setting aside the decision/order of the High Court:

(1) From the evidence adduced, there was uncertainty as to whether the I purported debt was the debt of the appellant solely or the debt of any or some or all of the five directors of the JD. The 2012 financial statement of the JD stated that the amount was owed by the 'directors' of the JD. It did not state that the total amount or any part of it was owed to the JD by the appellant (see para 16).

(2) According to the respondent, the appellant's debt was in relation to her purchase of shares in the JD. But the appellant had produced evidence to show that all her shares had been fully paid for. This piece of material evidence was not examined or evaluated at all by the High Court judge. It was then contended that the purported debt was a 'loan'. It was unclear how that same sum purportedly for unpaid shares had become a loan to a director and that, too, without the production of any board resolutions for that purpose (see paras 18–21).

(3) Note 9 in the notes to the 2012 financial statement of the JD put it beyond doubt that the purported debt was not a debt which could be garnished under O 49 of the Rules of Court 2012. It was not a 'debt due or accruing due to the judgment debtor' because the debt had yet to crystallise since Note 9 stated it to be 'unsecured, interest-free and has no fixed terms of repayment'. For a debt to be due and accruing due to the JD in respect of which a garnishee order absolute could be made, it had to be shown, at the time of application for the garnishee order, that a crystallised actionable debt was owed by the garnishee to the JD. A judgment creditor could not garnish a debt before it became due and payable (see paras 25–26 & 29–31).

[Bahasa Malaysia summary

Responden telah memperoleh penghakiman kewangan terhadap Carmichael Asia Sdn Bhd ('PH') dan memulakan prosiding saman penghakiman penghutang ('SPH') terhadap penghutang. Sepanjang prosiding SPH, juruaudit PH ('Siva') telah memberi keterangan bahawa perayu — pada masa itu salah seorang pengarah dalam PH — berhutang dengan PH sebanyak RM1,416,279 ('hutang yang dimaksudkan') sepertimana dinyatakan dalam penyata kewangan PH untuk tahun berkaor 31 Januari 2012. Bergantung kepada keterangan Siva, responden telah memfailkan prosiding untuk menggarnis hutang yang dimaksudkan. Perayu menafikan berhutang dengan PH hutang yang dimaksudkan dan menunjukkan keterangan bahawa dia telah membayar untuk semua saham dalam PH itu. Perayu juga telah menenderkan deklarasi statutori ('DS') daripada Siva yang mana Siva telah menarik balik apa yang dikatakannya semasa prosiding SPH da menjelaskan bahawa berdasarkan dia sedang mendapatkan maklumat selanjutnya daripada setiausaha syarikat itu perayu tidak mempunyai apa-apa hutang dengan PH. Hakim Mahkamah Tinggi telah menolak DS Siva atas alasan ia bercanggah dengan keterangan lisannya yang terdahulu. Hakim juga telah menolak hujah perayu dan menyatakan penyata kewangan PH jelas menunjukkan bahawa hutang yang dimaksudkan adalah terhutang oleh pengarah-pengarah PH. Hakim mengesahkan perintah mutlak garnisi yang telah dibuat terhadap perayu oleh penolong kanan pendaftar. Rayun ini adalah terhadap keputusan hakim Mahkamah Tinggi.

Diputuskan, sebulat suara membenarkan rayuan dan mengetepikan keputusan/perintah Mahkamah Tinggi:

(1) Berdasarkan keterangan yang dikemukakan, terdapat ketidakpastian berhubung sama ada hutang yang dimaksudkan adalah hutang perayu semata-mata atau hutang mana-mana atau beberapa atau kesemua lima pengarah PH. Penyata kewangan 2012 PH menyatakan bahawa jumlah tersebut adalah yang kena dibayar oleh 'pengarah-pengarah' PH. Ia tidak menyatakan bahawa keseluruhan jumlah atau mana-mana bahagiannya kena dibayar kepada PH oleh perayu (lihat perenggan 16).

(2) Menurut responden, hutang perayu adalah berkaitan belian sahamnya dalam PH. Namun perayu telah mengemukakan keterangan untuk menunjukkan bahawa semua sahamnya telahpun dibayar sepenuhnya. Keterangan material ini tidak diperiksa atau dinilai langsung oleh hakim Mahkamah Tinggi. Ia kemudian telah dihujahkan abhawa hutang yang dimaksudkan adalah suatu 'loan'. Ia adalah tidak jelas bagaimana jumlah sama yang dimaksudkan untuk saham yang tidak dibayar telah menjadi pinjaman kepada pengarah dan bahawa, itupun, tanpa dikemukakan apa-apa resolusi pengarah bagi tujuan tersebut (lihat perenggan 18–21).

(3) Nota 9 dalam nota-nota kepada penyata kewangan 2012 PH telah menunjukkan ia melampaui keraguan bahawa hutang yang dimaksudkan bukan suatu hutang yang boleh digarnisi di bawah A 49 Kaedah-Kaedah Mahkamah 2012. Ia bukan 'debt due or accruing due to the judgment debtor' kerana hutang tersebut masih belum menjadi kenyataan oleh kerana nota 9 menyatakan ia 'unsecured, interest-free and has no fixed terms of repayment'. Untuk suatu hutang yang kena diayar dan terakru kepada PH berkaitan perintah mutlak garnisi boleh dibuat, ia perlu dibuktikan, pada masa permohonan untuk perintah garnisi, bahawa hutang yang boleh diambil tindakan yang telah menajdi kenyataan adalah kena dibayar oleh garnisi kepada PH. Penghakiman pemiutang tidak boleh menggarnis hutang sebelum ia menjadi terhutang dan kena dibayar (lihat perenggan 25–26 & 29–31).]

Notes

For cases on garnishee order, see 2(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2286–2295.

Cases referred to

Bank of Montreal v IM Krisp Foods Ltd (1996) 6 CPC (4th) 90, CA (refd)

Binamin MJC Quarry Sdn Bhd v Way Soon Construction Sdn Bhd [2001] MLJU 111; [2001] 6 CLJ 213, HC (refd)

Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v Capital Insurance Bhd and another appeal [2004] 1 MLJ 353; [2004] 1 CLJ 357, CA (refd)

Citibank Bhd v Pembangunan Cahaya Tulin Sdn Bhd (receivers and managers

appointed) & Ors and other suits [2012] 9 MLJ 181, HC (refd)
Flextronics Technology (M) Sdn Bhd v Bumicircuit Technologies (M) Sdn Bhd and another appeal [2017] 4 MLJ 813; [2017] 4 CLJ 397, CA (refd)
Kedah Kelang Papan Sdn Bhd v Hansol Sdn Bhd (Teknibina Advisory Services Sdn Bhd, garnishee) [1988] 1 MLJ 434; [1988] 2 CLJ 194 (refd)
Malaysian International Trading Corp Sdn Bhd v RHB Bank Bhd [2016] 2 MLJ 457; [2016] 2 CLJ 717, FC (folld)
Maybank Islamic Bhd v WWE Holdings Bhd [2017] 4 MLJ 339; [2017] 1 LNS 712, CA (refd)
Tiong Hoo Teck v Wong Ho Enterprise Sdn Bhd & Ors (No 1) [2014] 4 MLJ 398; [2014] 1 LNS 272, CA (refd)

Legislation referred to

Arbitration Act 2005 s 38
Rules of Court 2012 O 38, O 49, O 49 rr 1, 1(1), 5
Rules of the High Court 1980 O 38, O 38 r 1

Appeal from: Civil No 37G-40–11 of 2014 (High Court, Kuala Lumpur)

Shahabudin Shaik Alaudin (Rosnida Che Ibrahim and Nur Fateha Abd Ghani with him) (Shahabudin & Rozima) for the appellant.
CC Choo (Karina Lee with him) (CC Choo, Hazila & Teong) for the respondent.

Mary Lim JCA (delivering judgment of the court):

[1] The appellant here is the garnishee in the proceedings before the High Court. Her appeal to set aside the garnishee order absolute dated 6 April 2015 which was ordered by the learned senior assistant registrar was dismissed by the learned judge on 8 October 2015. On 9 August 2016, the Court of Appeal set aside the decIsion of the learned judge and directed the High Court to hear the issue under O 49 r 5 of the Rules of Court 2012 — see pp 6–7 of the appeal records.

[2] On 17 April 2017, the learned judge dismissed the appellant's appeal and the grounds of decision are as appearing at pp 14–22. The grounds do not allude to the specific directions of the Court of Appeal; neither is O 49 r 5 addressed.

[3] At the hearing of the present appeal, we further noted that the issue of whether there was a 'debt due and accruing due' under O 49 r 1(1) of the Rules of Court 2012 was not addressed by the learned judge. We then invited the parties to further address us on the meaning of that phrase, and the explanation of note 9 in the financial statement of the judgment debtor. This is our decision following the further written submissions of both learned counsel.

A BACKGROUND FACTS

[4] A dispute between the respondent and Carmichael Asia Sdn Bhd culminated in an arbitration award rendered in its favour on 7 August 2012. After the award was registered at the High Court under s 38 of the Arbitration Act 2005 on 14 May 2013, the respondent initiated judgment debtor summons proceedings against Carmichael Asia Sdn Bhd ('Carmichael Asia'). At those proceedings, one Sivakumaru a/l V Kaliappan ('Siva'), the auditor of Carmichael Asia testified on 24 June 2014 (and not 24 June 2017 as stated in the grounds of decision, see p 133 appeal records) that there was a sum of RM1,416,279 owing from the directors of Carmichael Asia as shown in the financial statement of Carmichael Asia for the year ended 31 January 2012. Siva singled out the appellant as the director who owed that sum of money to Carmichael Asia. Although the appellant herself was examined, it was never established that she was the director who owed Carmichael Asia the sum mentioned. The only evidence came from Siva.

[5] Relying on this information, the respondent, as judgment creditor, filed garnishee proceedings pursuant to O 49 of the Rules of Court 2012 seeking to garnish the debt of RM1,416,279 that the appellant purportedly owes to Carmichael Asia.

[6] In response to the order to show cause, the appellant denied owing Carmichael Asia; claimed that she had fully paid for her purchase of shares in Carmichael Asia even before the shares were issued to her in her name; denied taking any advance from Carmichael Asia, neither were there any advances made to her — see affidavit affirmed on 10 February 2015, pp 26–28 record of appeal (*Bahagian* B and C). The appellant tendered a statutory declaration from Siva wherein Siva corrected his earlier testimony, explaining that his evidence given at the hearing of the JDS was without the benefit of certain information from the company secretary and that he now confirms that there is no debt due from the appellant.

[7] The learned judge rejected the contention of the appellant. The learned judge found that Carmichael Asia's financial statement ended 31 January 2012 was 'more than clear and unambiguous in stating that a loan of RM1,416,279.00 was owed by the directors of Carmichael Asia', that Siva had testified that that amount was a loan granted by Carmichael Asia to the appellant and is still owing and that Siva repeatedly said this during his testimony in the JDS proceedings. The learned judge rejected Siva's statutory declaration on the grounds that it was contradictory to his oral testimony; citing the decision in *Citibank Bhd v Pembangunan Cahaya Tulin Sdn Bhd (receivers and managers appointed) & Ors and other suits* [2012] 9 MLJ 181,

where the same was prohibited under O 38 r 1 of the Rules of the High Court 1980.

DETERMINATION OF THIS COURT

[8] Since this was a rehearing on terms that were directed by the Court of Appeal on 9 August 2016, it is imperative that there be compliance of that direction. The order of the Court of Appeal states:

> ... DAN SETELAH MENDENGAR hujahan pihak-pihak yang hadir MAKA ADALAH DENGAN PERSETUJUAN DIPERINTAHKAN bahawa:
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> (a) Perintah Mahkamah Tinggi bertarikh 08.10.2015 diketepikan tanpa perintah terhadap kos dan perkara ini dirujuk semula dihadapan Hakim yang sama untuk dibicarakan mengenai isu yang diperuntukkan dalam Aturan 49 Kaedah 5, Kaedah-Kaedah Mahkamah 2012;
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> (b) Deposit dipulangkan kepada Perayu.

[9] The Court of Appeal specifically directed a rehearing under O 49 r 5 which reads as follows:

> Dispute of liability by garnishee (O 49 r 5)
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> 5 Where on the further consideration of the matter the garnishee disputes liability to pay the debt due or claimed to be due from him to the judgment debtor, the Court may summarily determine the question at issue or order in Form 100 that any question necessary for determining the liability of the garnishee be tried in any manner in which any question or issue in an action may be tried, without, if it orders before the Registrar, the need for any consent by the parties.

[10] Nowhere in the grounds of judgment does the learned judge expressly address this issue. However, from a careful reading of the grounds, we are minded to find that the learned judge has nevertheless implicitly dealt with the matter in the manner directed. His lordship had considered the appeal and had summarily determined the dispute of liability by the appellant based on the affidavits before the court.

[11] Moving on to what we see as the pivotal issue before this court and that is the question of whether the alleged debt may be garnished pursuant to O 49 r 1 of the Rules of Court 2012, as a, 'debt due or accruing due to the Judgment Debtor by the Garnishee'. Although seemingly simple, this phrase is not 'exactly easy to understand', as observed by Suriyadi FCJ in the majority decision in *Malaysian International Trading Corp Sdn Bhd v RHB Bank Bhd* [2016] 2 MLJ 457; [2016] 2 CLJ 717, citing Jackson J in *Bank of Montreal v IM Krisp Foods Ltd* (1996) 6 CPC (4th) 90 (CA). Furthermore, the debt must be due or accruing due at the time of the application for the garnishment order.

[12] For this part of our judgment, we shall thenceforth refer to the appellant as the 'garnishee', the respondent as the 'judgment creditor' and Carmichael Asia as 'the judgment debtor'.

[13] After careful consideration of both counsel's oral and written submissions as well as a perusal of the appeal records, we are of the unanimous view that the alleged debt cannot be garnished as it has not complied with the requirements of O 49 r 1 in two material respects.

[14] First, there must be a debt owed by the garnishee to the judgment debtor, as seen from the consistent line of authorities — *Malaysian International Trading Corp Sdn Bhd v RHB Bank Bhd* [2016] 2 MLJ 457; [2016] 2 CLJ 717; *Binamin MJC Quarry Sdn Bhd v Way Soon Construction Sdn Bhd* [2001] MLJU 111; [2001] 6 CLJ 213; *Maybank Islamic Bhd v WWE Holdings Bhd* [2017] 4 MLJ 339; [2017] 1 LNS 712; *Flextronics Technology (M) Sdn Bhd v Bumicircuit Technologies (M) Sdn Bhd and another appeal* [2017] 4 MLJ 813; [2017] 4 CLJ 397; *Tiong Hoo Teck v Wong Ho Enterprise Sdn Bhd & Ors (No 1)* [2014] 4 MLJ 398; [2014] 1 LNS 272; *Kedah Kelang Papan Sdn Bhd v Hansol Sdn Bhd (Teknibina Advisory Services Sdn Bhd, garnishee)* [1988] 1 MLJ 434; [1988] 2 CLJ 194. It must be clear that it is the garnishee who is indebted to the judgment debtor, and not someone else.

[15] In the present appeal, the judgment creditor relied on the 2012 financial statement of the judgment debtor and the evidence of Siva, the judgment debtor's auditor to prove the existence of the garnishee's debt of RM1,416,279 owed to the judgment debtor. Both pieces of evidence were seriously flawed and unreliable.

[16] From the evidence adduced, there is uncertainty as to whether the alleged debt was the debt of the garnishee solely or the debt of any or some or all of the directors of the judgment debtor, and there are five directors according to the company records filed with Companies Commission. The 2012 financial statement of the judgment debtor, stated that the amount was owed by the 'directors' to the judgment debtor. It did not, however, state whether the total amount or any part thereof was in fact owed to the judgment debtor by the garnishee.

[17] In addition, at the garnishment proceedings the garnishee had denied owing the alleged debt to the judgment debtor. And, it was not a mere denial.

[18] According to the judgment creditor, the garnishee's debt is in relation to the garnishee's purchase of shares in the judgment debtor. Apparently, the garnishee had not paid for the purchase and the sum of RM1,416,279 represents that debt.

[19] Not only was the allegation of non-payment of the shares and thereby the existence of the debt denied by the garnishee, she had also provided evidence to the contrary. At pp 112–115 of the appeal record is Form 24, evidencing the allotment of shares after the garnishee has fully paid for the purchase of her shares. This piece of material evidence was unfortunately, not examined or evaluated at all by the learned judge. This evidence shows that the judgment creditor's claim of the existence of a debt owed by the garnishee by reason of non-payment of her purchase of shares in the judgment debtor is, unsustainable.

[20] The judgment creditor also relied on the evidence of Siva, who testified that the sum of RM1,416,279 is owed by the garnishee. At pp 109–110, it can be seen that Siva went on to agree with the suggestion of the judgment creditor's counsel that this sum is then 'a loan' to a director, and that the 'loan amount ini owed back to the Company'.

[21] Quite aside from our earlier observations on the improper treatment of this sum of RM1,416,279, it is unclear how that same sum for the unpaid shares has now become a loan to a director. And, this is without production of any board resolutions for that purpose.

[22] In any case, there is now the contradictory evidence of Siva. At the hearing of the JDS, Siva testified that the loan amount stated in the 2012 financial statement was owed by the garnishee to the judgment debtor; that it was payment towards the garnishee's share acquisition. However, he subsequently retracted his statement by filing a statutory declaration refuting his earlier contention that the loan to the directors was owed by the garnishee to the judgment debtor.

[23] The learned judge declined to look at Siva's statutory declaration citing *Citibank Bhd v Pembangunan Cahaya*. However, if that decision had been properly considered, the learned judge would have found that the decision made under O 38 of the Rules of the High Court 1980 has no application in the present circumstances. That was a case where a witness who was supposed to provide oral testimony attempted to testify instead through a statutory declaration on the ground that he was medically unfit to give evidence at the trial. The admissibility of the statutory declaration, given under such conditions, was challenged. In upholding the challenge, the court cited O 38 r 1 in support, that a witness of fact in writ actions must testify orally and in open court. The court refused to admit the statutory declaration, seeing it as an attempt to 'bypass O 38 r 1 of the RHC'.

[24] The present proceedings do not involve a trial within the terms of O 38 (now O 38 of the Rules of Court 2012); and certainly it cannot be said that the

statutory declaration was prepared in order to bypass any of the provisions of the Rules of Court. The garnishee was adducing affidavit evidence in answer to the cause issued against her. She is entitled to adduce evidence to prove her responses. More materially, it was incumbent on the learned judge to properly appreciate the full circumstances including considering whether O 38 of the Rules of Court 2012 in fact applied and how O 49 operates in the event of such a happenstance; critically analyse the evidence taken at the JDS proceedings in order to determine whether there was credible evidence upon which the court may grant the garnishee order absolute; consider whether Siva was in fact contradicting himself in the first place; and evaluate the contents of the statutory declaration against the affidavits filed by both parties.

[25] The judgment creditor's application does not meet the requirements of O 49 in another material respect. Before an order to garnish may be issued, the debt must be 'due or accruing due to the Judgment Debtor'.

[26] Having examined the 2012 financial statement of the judgment debtor, and even if we were to accept that the alleged debt stated therein is the debt of the garnishee, (although there is no evidence to that effect), it is not a 'debt due or accruing due to the Judgment Debtor'.

[27] These are the terms of O 49 r 1 of the Rules of Court 2012:

> 1(1) Where a person (who is referred to as 'the judgment creditor' in this Order) has obtained a judgment or order for the payment of money by some other person (who is referred to as 'the judgment debtor' in this Order), not being a judgment or order for the payment of money into Court, and any other person within the jurisdiction (who is referred to as 'the garnishee' in this Order), is indebted to the judgment debtor, the Court may, subject to the provisions of this Order and of any written law, order the garnishee to pay the judgment creditor the amount for any debt due or accruing due to the judgment debtor from the garnishee, or so much thereof as is sufficient to satisfy that judgment or order and the costs of the garnishee proceedings.
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> (2) ...
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> (3) In this Order, 'any debt due or accruing due' includes a current or deposit account with a bank or other financial institution, whether or not the deposit has matured and notwithstanding any restriction as to the mode of withdrawal.

[28] At note 9 in the notes to the 2012 financial statement, it is stated as follows:

> This amount is unsecured, interest free and has no fixed terms of repayment.

[29] It is our respectful view that note 9 puts it beyond doubt that the amount of RM1,416,279 is not a debt within the terms of O 49. The debt has

yet to crystallise as it is 'unsecured, interest free and has no fixed terms of repayment'. With no fixed terms of repayment, it is unclear how the judgment debtor would have been able to mount a claim against the director concerned, whoever it may be. If the judgment debtor is unable to claim upon such a 'debt', clearly that sum of RM1,416,279 is not a 'debt due or accruing due' within the meaning and intent of O 49 of the Rules of Court 2012.

[30] We are further fortified in our view by the Federal Court's recent decision in *Malaysian International Trading Corporation Sdn Bhd v RHB Bank Bhd*. Here, the Federal Court had occasion to consider the meaning of the phrase 'debt due and accruing due' in O 49 r 1. Although there was substantial debate on whether monies held in fixed deposit accounts used to secure the respondent bank's grant of various banking facilities to the judgment debtor could be uplifted and utilised by the respondent bank to set off the debt, or could these same monies be paid over under the order of garnishment, that issue is not relevant for the purposes of this appeal. After examining a line of authorities including the case of *Cheong Heng Loong Goldsmiths (KL) Sdn Bhd & Anor v Capital Insurance Bhd and another appeal* [2004] 1 MLJ 353; [2004] 1 CLJ 357, the Federal Court went on to propound the view that for a debt to be due and accruing due to the judgment debtor, there must be, at the time of application of the garnishee order a crystallised actionable debt owed by the garnishee to the judgment debtor.

[31] Thus, a judgment creditor is not entitled to garnish the debt before it becomes due and payable. The Federal Court also approved of the case of *Binamin MJC Quarry Sdn Bhd v Way Soon Construction Sdn Bhd*, where it was similarly held that there must be a crystallised actionable debt by the garnishee to the judgment debtor before an absolute garnishee order could be given.

[32] Premised on the authorities abovementioned, we are of the considered view that since the alleged debt referred to in note 9 of the 2012 financial statement has no fixed terms of repayment, it has not crystallised into an actionable debt to qualify as a 'debt due or accruing due' for the purposes of O 49 r 1 of the Rules of Court 2012. We are not convinced that there is a debt due or accruing due from the garnishee to the judgment debtor, upon which the judgment creditor could garnish and have the debt settled directly to the judgment creditor.

[33] The learned judge failed to take any of the aforementioned matters into consideration. Had the learned judge done so, it would not be proper for this court to interfere as it is an exercise of discretion and the learned judge would be entitled to draw his conclusions. But, in the instant appeal, the learned judge has plainly erred in the appreciation and application of the legal principles pertaining to the grant of a garnishee order.

A **[34]** We add that in the event of such conflicting evidence, there is the further option of O 49 r 5. Under this provision, the learned judge may direct the issue of establishing whether there was a debt due and accruing due be disposed of through *viva voce* evidence. That, too, was not considered.

B **[35]** Thus, it is our unanimous finding that the decision of the learned High Court judge was plainly wrong and warrants appellate intervention. Accordingly, we allow this appeal with no order as to costs. The decision and order of the High Court is therefore set aside.

C *Appeal allowed unanimously and decision/order of the High Court set aside.*

Reported by Ashok Kumar

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